# National Labor Relations Board



# Weekly Summary of NLRB Cases

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Press Release (R-2587): Harold Maier Appointed Resident Officer in NLRB's Miami, FL Office

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Concrete Form Walls, Inc. (10-CA-34483, 34584, 10-RC-15381; 346 NLRB No. 80) Birmingham, AL April 13, 2006. The Board upheld the administrative law judge's findings that the Respondent violated Section 8(a)(3), (4), and (1) of the Act by discharging employees Jesus (Omar) Garcia Vela, Cesar Moreno, Venancia Morales Serrano, and Severino Morales because they voted in the representation election held in Case 10-RC-15381, and violated Section 8(a)(1) and engaged in objectionable conduct by promising employees a wage increase on the eve of the election. It agreed that the Respondent's challenges to seven voters on the basis that they are undocumented aliens who are not statutory employees, should be overruled. Contrary to the judge, the Board found that the Respondent did not violate Section 8(a)(1) when a supervisor told unit employees that the Respondent had searched one of the supervisor's trucks or by creating the impression of surveillance of its employees' union activities. [HTML] [PDF]

Based on the Respondent's hallmark violations of the Act, Chairman Battista and Member Liebman agreed with the judge that a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), based on 18 signed authorization cards in the 25-employee unit, is warranted to remedy the Respondent's unlawful conduct. Member Schaumber disagreed. He argued that a *Gissel* bargaining order is an extraordinary remedy and the preferred route is to provide traditional remedies for the unfair labor practices and to hold an election once the atmosphere has been cleansed by those remedies. Member Schaumber noted that the Board has adopted the judge's recommended special remedy of requiring the notice to be read aloud to employees by a management official or a Board agent in the official's presence. He would find this remedy, together with the Board's traditional remedies, sufficient in this case.

The Board approved the judge's recommendation that Alabama Carpenters Regional Council Local 127's Objections 2 and 3 be sustained and that Objections 7 and 8 be overruled. It directed the Regional Director to open and count the ballots of Severino Morales, Cesar Moreno, Venancia Morales Serrano, Jesus (Omar) Garcia, Pedro Contreras, Valente Martinez, and Benjamin Moreno and to prepare and serve on the parties a revised tally of ballots.

If the revised tally reveals that the Union has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. The certification of representative shall be in addition to the bargaining order. *General Fabrication Corp.*, 328 NLRB 1114, 1116 fn. 17 (1999), enfd. 222 F.3d 218 (6<sup>th</sup> Cir. 2000); *Eddyleon Chocolate* Co., 301 NLRB 887, 892 (1991). If, however, the revised tally shows that the Union has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, vacate the proceedings in Case 10-RC-15381, and the bargaining order shall take effect. *Moe Warehouse & Accessory*, 275 NLRB 1132 Fn. 1 (1986).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Alabama Carpenters Regional Council Local 127; complaint alleged violation of Section 8(a)(1), (3), (4), and (5). Hearing at Birmingham, April 13-14, 2004. Adm. Law Judge Lawrence W. Cullen issued his decision Sept. 8, 2004.

Diamond Electric Manufacturing Corp. (7-CA-41236, 41918; 346 NLRB No. 83) Dundee, MI April 14, 2006. The administrative law judge found that the Respondent violated Section 8(a)(1) and (3) of the Act after signing a settlement agreement and a stipulated election agreement with the Auto Workers (UAW), by discharging union supporter Robert Bomia and issuing a final warning to union activist Peggy Heiden because of their union activity; that the Regional Director properly set aside the parties' settlement agreement based on the postsettlement violations; that the Respondent committed numerous violations of Section 8(a)(1) and (3) by its presettlement conduct; and that a *Gissel* bargaining order was necessary based on the presettlement and postsettlement violations. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). [HTML] [PDF]

The Board adopted the judge's decision with respect to one of the postsettlement violations and concluded that the isolated violation did not warrant setting aside the settlement agreement and imposing a *Gissel* order. Chairman Battista and Member Schaumber, with Member Liebman dissenting, found that Bomia's discharge was not unlawful. Chairman Battista and Member Liebman agreed with the judge that Heiden's final warning was unlawful. Member Schaumber found it unnecessary to pass on whether the Respondent unlawfully issued a final warning to Heiden. Assuming arguendo that the Respondent did so, he found that the violation is insufficient to warrant setting aside the settlement agreement.

Contrary to her colleagues, Member Liebman found that the Respondent seized upon the production error of an untrained union supporter, Bomia, to discharge him, although the comparable errors of other employees had been tolerated. She decided that the judge correctly set aside the settlement agreement and found that the Respondent's presettlement conduct violated the Act and that a *Gissel* bargaining order is warranted.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by UAW; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Detroit, Dec. 6-8, 1999 and Feb. 7-10, 2000. Adm. Law Judge John H. West issued his decision June 20, 2001.

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Enloe Medical Center (20-CA-31806-1, 20-RC-17937, et al.; 346 NLRB No. 82) Little Rock, AR April 14, 2006. The Board denied in part, and granted in part, the Respondent's motion for reconsideration of the Board's Decision, Order, and Certification of Representative reported at 345 NLRB No. 54 (2005). Member Liebman, in her partial dissent, found no basis for reconsideration. [HTML] [PDF]

The Board denied the Respondent's motion insofar as it sought reconsideration of the finding that the Respondent violated Section 8(a)(1) of the Act by requiring employees to remove or cover badges that stated, "Ask me about our union" or "Ask me about SEIU" pursuant to its overbroad rule. Paragraph 6 of the complaint alleged that the Respondent, through the conduct of five supervisors, "orally promulgated an overly broad no-solicitation rule by

prohibiting employees from wearing union insignia in all areas of Respondent's facility." The Board determined that the violation found was closely related to the complaint allegation and was fully and fairly litigated.

Paragraph 7(a) of the complaint alleged that the "Respondent, by Gale Mitchell . . . about February 19, 2004, promulgated in writing an overly broad no-solicitation rule by prohibiting employees from distributing Union literature in the breakroom of Respondent's facility. At the hearing, the General Counsel established that the Respondent sent an e-mail message to employees on February 19, 2004, stating: "As we discussed in our staff meeting, it is not appropriate for union literature to be . . . placed in our break room." In the earlier decision, the Board found that the Respondent's email message barring the placement of union literature in the breakroom violated Section 8(a)(1) because the message was facially discriminatory because it singled out union literature.

Chairman Battista and Member Schaumber noted that the complaint alleged an "overly broad no-solicitation rule" and the Board found violative an allegedly discriminatory no-distribution rule. "The Respondent would not have known to defend against a contention that the rule was discriminatory, and nothing that occurred at the hearing put the Respondent on notice of such an allegation," they explained. Because the violation as found, was not fully and fairly litigated, Chairman Battista and Member Schaumber remanded the case to the administrative law judge to provide the Respondent an opportunity to litigate whether the rule contained in its February 19, 2004 e-mail message to employees was discriminatory on its face and, therefore, violated Section 8(a)(1).

Member Liebman found the Respondent's due process arguments without merit and would also deny this part of its motion for reconsideration. She explained that complaint paragraph 7(a), alleging a violation of Section 8(a)(1), "put the Respondent on notice that the lawfulness of the e-mail was at issue and refers specifically to the date on which the e-mail was disseminated. Moreover, the e-mail itself was introduced, without objection, into evidence at the hearing." In addition, Member Liebman observed that the Respondent's motion neither claims material error nor extraordinary circumstances warranting the Board's reconsideration of its original decision or evidence justifying the reopening of the hearing, as expressly required by Section 102.48(d)(1) of the Board's Rules and Regulations.

(Chairman Battista and Members Liebman and Schaumber participated.)

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#### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

*Universal Syndications, Inc.* (an Individual) Canton, OH April 10, 2006. 8-CA-35901; JD-26-06, Judge Michael A. Rosas.

Freightliner Custom Chassis Corp. (Autoworkers) Gaffney, SC April 11, 2006. 11-CA-20842, 20877; JD(ATL)-10-06, Judge William N. Cates.

*Safety Kleen Systems, Inc.* (Teamsters Local 641) April 13, 2006. 22-CA-26970, 22-RC-12532; JD(NY)-17-06, Judge Mindy E. Landow.

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## LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)

## DECISION AND CERTIFICATION OF REPRESENTATIVE

Pace University, Briarcliff Manor, Peasantville, and White Plains, NY, 2-RC-23032, April 12, 2006 (Members Liebman, Schaumber, and Kirsanow)

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(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

## DECISION AND CERTIFICATION OF REPRESENTATIVE

- The Arc of Jacksonville, Ltd., Jacksonville, IL, 33-RC-4954, April 11, 2006 (Members Schaumber, Kirsanow, and Walsh)
- *Holloran Contracting*, St. Louis, MO, 14-RC-12594, April 11, 2006 (Members Schaumber, Kirsanow, and Walsh)
- Rockaway Hotel, LLC d/b/a Homewood Suites Hotel, Edgewater, NJ, 22-RC-12672, April 11, 2006 (Members Schaumber, Kirsanow, and Walsh)

## DECISION AND DIRECTION [that Regional Director open and count challenged ballots]

Patten Industries, Inc., Oglesby, IL, 33-RC-4951, April 12, 2006 (Members Schaumber, Kirsanow, and Walsh)

## DECISION AND ORDER [sustaining the challenges to 2 ballots and remanding to Regional Director for further appropriate action]

Steingass Mechanical Contracting, Inc., Medina, OH, 8-RC-16759, April 12, 2006 (Members Schaumber, Kirsanow, and Walsh)

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Paul Smith's College of Arts and Sciences, Paul Smiths, NY, 3-RC-11685, April 12, 2006 (Members Liebman, Schaumber, and Kirsanow)
KR Drenth Trucking, Inc. d/b/a TK Services, Inc., Indianapolis, IN, 25-RC-10328, April 12, 2006 (Members Liebman, Schaumber, and Kirsanow)

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